87-386

Supreme Court, U.S.
FILED
AUG 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

BRIAN LISTER, Petitioner

vs.

NORTH AMERICAN ROCKWELL, AUTONETICS, Respondent

PETITION FOR

WRIT OF CERTIORARI

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIAN LISTER
1414 North Lowell
Santa Ana, California 92706
714) 542-3674
Petitioner Pro Se

QUESTION PRESENTED FOR REVIEW

Does the implementation by an employer of a private, voluntarily adopted, race-conscious affirmative action plan, which results in the termination of employment of a male, caucasian, anglo employee, in favor of minority employees, violate that employee's Constitutional rights, under the Fourteenth Amendment, by virtue of discrimination?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Type of Case 1

Case History 2

Issues 5

Conclusion 5

Jurisdictional Statement 7

Appendix 9

TABLE OF AUTHORITIES

Cases	Pages
Brown v. Neeb 644 F 2d 551 (6th Cir., 1981).	33
Chance v. Board of Examiners (CA2, 1976) 534 Fd 993, 11 FEP Cases 1450.	4
Clayton v. McDonnell Douglas Corp. 13 FEP 451 (C.D. Cal. 1976), on appeal, No. 76-3198 (9th Cir. 1977).	14
Dennison v. City of Los Angeles Department of Water and Power 658 F 2d 694, (9th Cir., 1981).	36
Diaz v. American Telephone & Telegraph 752 F 2d 1356, 1360 n.5 (9th Cir. 1985)	12
EEOC v. Occidental Life Ins. Co. 535 F 2d 533 (9th Cir. 1976).	14
Firefighters Local Union No. 1784 v. Stotts US Sct, 34 EPD 34,415).	4, 12, 20
Franks v. Bowman Transportation Co. 424 U.S. 1747, 778-79 (1976).	20
Golden v. Faust 766 F 2d 1339, 1340 (9th Cir. 1985).	10
Jackson Tool and Die, Inc. v. Smith, infra.	34
Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 462 (1975).	14
Johnson v. Transportation Agency 748 F 2d 1308, 1311 (9th Cir. 1984).	10
Local Number 93 v. City of Cleveland No. 84-1999.	4
Moseley v. Goodyear Tire & Rubber Co. 612 F 2d 187 (5th Cir. 1980).	10, 35

TABLE OF AUTHORITIES

Cases	Pages
Reed v. Lockheed Aircraft Corp. 613 F. 2d at 759.	33, 34
Setser and Moseley v. Goodyear Tire and Rubber Co. 612 F 2d 187 (5th Cir., 1980).	10
Setser v. Novack Investment Corporation 657 F 2d 962 (8th Cir., 1981).	19, 35
Stotts v. Memphis Fire Department 679 F 2d 541 (6th Cir. 19820.	33
Tangren v. Wackenhut Services, Inc. 658 F 2d 705 (9th Cir., 1981).	19, 20, 36
United States v. City of Miami 14 F 2d 1322 (5th Cir., 1980).	36
United Steel Workers of America v. Weber 443 U.S. 193,99 S. Ct. 2721,61 L. Ed. 2d, 480 (1979).	10, 34

I

TYPE OF CASE

This case involves racial discrimination against Brian Lister, a white male, by North American Rockwell, Autonetics. Petitioner also alleges North American Rockwell, Autonetics engaged in sexual discrimination against Brian Lister.

II
CASE HISTORY

Petitioner is a white male who was hired by North American Rockwell on April 16, 1962 as a Blueprint Trimmer and Folder at its Autonetics Division.

Respondent had instituted an affirmative action program known as the "Skills Development Program" (SDP) in July of 1969. The SDP was a private, voluntarily adopted, race-conscious affirmative action plan.

On or about January 19, 1971 the Respondent elected to reduce the number of employees in the Blueprinter classification. Petitioner was downgraded to a Bindery Worker. Two employees, Hispanic males, remained in the Blueprinter classification. They had less seniority than Petitioner, but were participants in the SDP.

On or about January 29, 1971, North American Rockwell elected to reduce the number of employees in the Bindery Worker classification. Petitioner's supervisor told Petitioner that he had been instructed by North American Rockwell not to lay off any minorities. Petitioner was laid off on February 1, 1971. One employee, an Anglo female, less senior than Petitioner, remained in the Bindery Worker classification as she was a member of SDP.

On June 29, 1971, Petitioner filed with the Equal Employment Opportunity Commission (EEOC) a charge of employment discrimination against North American Rockwell alleging

that Petitioner had been terminated from his employment with North American Rockwell on the basis of his race, Caucasian, and national origin, Anglo, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. S 2000e, **et seq.** (1982) (Title VII).

On August 17, 1976, Petitioner received from the EEOC a Determination Letter notifying him that it had not found reasonable cause to believe that his charge was true and that he had a right to file suit within 90 days after receipt of the letter.

On November 12, 1976, Petitioner instituted this action alleging "reverse discrimination" on the basis of race and national origin in violation of Title VII. Petitioner asserts North American Rockwell, in their zeal to maintain affirmative action goals, subjected plaintiff/appellant to a downgrading and an eventual layoff while minorities and females, with less seniority, retained their positions. Petitioner further asserts North American Rockwell gave preferential treatment to minorities and women when it began layoffs to bring about a reduction in its work force.

On February 14, 1984, Judge Albert Lee Stephens, Jr., denied North American Rockwell's Motion for Summary Judgment. Thereafter, the case was transferred to Judge William Matthew Byrne, Jr.

North American Rockwell moved for reconsideration of its Motion for Summary Judgment.

On June 11, 1984, Judge Byrne allowed Petitioner's attorney to withdraw from the case.

On June 22, 1984, Judge Byrne heard the Respondent's Motion for Summary Judgment, and granted same. Judge Byrne also made a Finding of Fact and Conclusions of Law.

III

The lower courts erred in finding for the Respondent.

Petitioner believes a careful reading of his Memorandum of Points and Authorities In Opposition to Defendants' Motion for Reconsideration, dated June 4, 1984, will show the lower courts erred in finding for the Respondent. A copy is included for the court's consideration. Also attached are copies of Judge Byrne's Finding of Fact and Conclusions of Law, and the transcript of the proceedings on June 4, 1984.

Petitioner would also request the court to review this case as it relates to **Firefighters Local Union No. 1784 v. Stotts,** US Sct, 34 EPD 34,415. This case is one of the most recent dealing with "reverse discrimination." It clearly states seniority rights of white employees may not be violated in an attempt to maintain the level of minority representation achieved through affirmative action.

Petitioner would further ask the court to review this case as it relates to **Chance v. Board of Examiners,** (CA 2, 19767) 534 Fd 993, 11 FEP cases 1450. The court said "If racial quotas prevent the excessing of a black or Puerto Rican, a white person with greater seniority must be excessed in his place." The result would be constitutionally forbidden reverse discrimination."

The court may also wish to take into consideration **Local Number 93 v. City of Cleveland, No. 84-1999.**

IV
ISSUES

Petitioner believes the primary issue is whether or not Respondent, while in a layoff mode, can lay off senior white employees while retaining less senior minorities, by race and gender, in order to maintain the minority representation achieved through affirmative action. Does this layoff, of the senior white employee, deprive him of equal protection under the Fourteenth Amendment?

V
CONCLUSION

Petitioner seeks a reversal of the decisions of the District and Circuit courts in this case.

VII

JURISDICTIONAL STATEMENT

QUESTION PRESENTED BY THE PETITION: Petitioner Lister, a white male, worked for North American Rockwell, Autonetics, Respondent. North American Rockwell instituted an affirmative action program, known as Skills Development Program, some seven years after appellant Lister was hired. About one year after instituting their SDP program, North American Rockwell went into a layoff mode. In order to retain those employees hired and promoted pursuant to their affirmative action plan, North American Rockwell demoted and layed off white male workers with more seniority. Petitioner Lister was one of those workers.

The question is: Were Petitioner Lister's rights, under the Equal Protection Clause of the Fourteenth Amendment, violated by North American Rockwell when they layed off Lister, a senior white employee, while retaining less senior minorities, by race and gender, in order to maintain minority representation achieved through affirmative action?

GROUNDS OF JURISDICTION: This is a racial discrimination case arising under the Equal Protection clause of the Fourteenth Amendment. It is being appealed from the U.S. Ninth Circuit Court of Appeals. The date of judgment, in the federal trial court, was June 22, 1984, rendered in favor of North American Rockwell. This Petitioner filed an appeal with the United States Ninth Circuit Court of Appeals on July 24, 1984. This appeal was denied by that court on January 28, 1986. A Petition for Rehearing was filed on February 26, 1986. This was rejected on May 19, 1986.

The constitutional issues of this case involve the Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The issue of equal rights and protection was raised during trial and again during the appellant's appeal before the United States Ninth Circuit Court of Appeals.

The question of law is substantial, because it involves the rights of an American citizen.

APPENDIX

Page

1. **Memorandum.** U.S. Court of Appeals for the Ninth Circuit. Filed January 28, 1986 10

2. **Order.** U.S. Court of Appeals for the Ninth Circuit. Filed May 19, 1986 13

3. **Order Granting Defendant's Motion to Dismiss.** Entered May 26, 1977, U.S. District Court, Central District of California 14

4. **Judgment.** U.S. District Court, Central District of California. Filed June 22, 1984. 16

5. **Findings of Fact and Conclusions of Law.** U.S. District Court, Central District of California. Filed June 22, 1984 17

6. **Determination.** Equal Employment Opportunity Commission. Dated August 17, 1976 22

7. **No Cause Dismissal Notice of Right to Sue Within 90 Days.** Equal Employment Opportunity Commission. Dated August 17, 1976 31

8. **Memorandum.**Points and Authorities in Opposition to Defendant's Motion for Reconsideration. Dated June 4, 1984 33

APPENDIX

"NOT FOR PUBLICATION"
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN LISTER,	)	
	)	CA No. 84-6175
Plaintiff-Appellant,	)	
	)	DC No. CV 76-3538
v.	)	
NORTH AMERICAN ROCKWELL, AUTONETICS,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Honorable Wm. Matthew Byrne, Jr., Presiding
Submitted November 29, 1985

Before: BARNES, FARRIS, and CANBY, Circuit Judges.

The panel unanimously agrees that this case may be submitted without oral argument.

Brian Lister appeals pro se[1] the district court's order granting summary judgment in favor of North American Rockwell in this Title VII reverse discrimination action.

Because of division-wide work force reductions at Rockwell, Lister was downgraded from a Blueprint Trimmer and Folder to a Bindery Worker. Within two weeks, because of further work force reductions, he was laid off. Lister was downgraded and eventually laid off at a time when minorities with less

seniority were retained. He sued alleging reverse racial and national origin discrimination under Title VII, 42 U.S.C. § 2000e **et seq.**

Rockwell moved for summary judgment, claiming that the retained minorities were participants in an affirmative action program that complied with the requirements set out in **United Steelworkers of America v. Weber,** 443 U.S. 193 (1979), and that, therefore, monority retention under the program did not violate Title VII. The district court originally denied Rockwell's motion, but on reconsideration, a second district court judge granted summary judgment for Rockwell. We review **de novo., Golden v. Faust,** 766 F.2d 1339, 1340 (9th Cir. 1985).

Lister correctly states that summary judgment can be granted only if there is no genuine dispute as to any material fact; and argues that material issues of fact exist concerning whether Rockwell's Skills Development Program conformed to the requirements of **Weber.** Lister argues under **Setser v. Novack Investment Corporation,** 657 F.2d 962 (8th Cir. 1981) and **Moseley v. Goodyear Tire & Rubber Co.,** 612 F.2d 187 (5th Cir. 1980), that Rockwell's SDP operated to unnecessarily trammel the interests of white employees and exceeded its remedial purposes.

Weber sets out guidelines for the implementation ot private voluntary affirmative action programs. **Weber,** 443 U.S. at 208; **accord Johnson v. Transportation Agency,** 748 F.2d 1308, 1311 (9th Cir. 1984). Rockwell's SDP has adhered to those guidelines. First, the SDP's purpose was to ameliorate old patterns of discrimination and, therefore, mirrored the purpose of Title VII. Second, the SDP did not unnecessarily trammel the rights of white employees; white males were included in the program. Third, the program did not create an absolute bar to the advancement of white employees. Fourth, the program was temporary and designed to eliminate a manifest racial imbalance rather than maintain a racial balance.

Our careful review of the record reveals that there are no genuine issues as to any material fact concerning whether Rockwell discriminated against Lister in violation of Title VII by implementing SDP. AFFIRMED.

FOOTNOTE

[1]Rockwell suggests that the appeal be dismissed for Lister's failure to comply with ninth circuit rules. Lister was represented by counsel before the district court: Nonetheless, he has filed a pro se appeal. Since Lister has presented the postural nature of the case and an argument to support his contentions, we decide this case on the merits.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN LISTER,	)	
Plaintiff-Appellant,	)	CA NO. 84-6175
v.	)	
NORTH AMERICAN ROCKWELL, AUTONETICS,	)	DC No. CV 76-3538 (Central California)
	)	
Defendant-Appellee.	)	ORDER

Before: BARNES, FARRIS, and CANBY, Circuit Judges.

The panel has voted to amend the memorandum disposition filed January 28, 1986 by inserting a paragraph on page 3, line 6, just prior to the final paragraph of the disposition.

Lister also argued that **Firefighters Local Union No. 1784 v. Stotts,** 104 S. Ct. 2576 (1984) supports his position since the Supreme Court invalidated an injunction which prohibited a municipality from instituting a last hired, first fired policy. **Firefighters** is not dispositive. The Supreme Court "simply [held] that a court may not modify a pre-existing race-conscious consent decree in such a fashion that employment practices would divest another group of employees of entitlements under a bona fide seniority system." **Diaz v. American Telephone & Telegraph,** 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

The petition for rehearing is denied. The memorandum disposition filed January 28, 1986 is amended as set forth above.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN LISTER,	)	
Plaintiff,	)	CV 76 3538 ALS
vs.	)	ORDER GRANTING
NORTH AMERICAN ROCKWELL, AUTONETICS,	)	DEFENDANT'S MOTION TO
Defendant.	)	DISMISS
	)	

This is an employment discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000 **et seq.**). Plaintiff, a Caucasian male, was discharged from his employment with the defendant company on or about February 1, 1971, after having been employed by the defendant for approximately nine years. Plaintiff alleges that he was discharged because of his race.

On or about June 29, 1971, plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOCD") alleging discrimination on the basis of his race. On August 17, 1976, the EEOC dismissed plaintiff's charge, finding no cause to believe that the defendant had engaged in employment discrimination. At the same time (August 17, 1976) the EEOC advised plaintiff that he was entitled to institute a civil action in the appropriate federal court within 90 days. The instant action was filed on November 12, 1976.

Defendant has moved, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's action on the ground that it is time barred. Defendant's motion came on regularly for hearing on April 25, 1977, before the honorable Albert Lee Stephens, Jr., United States District Judge. Having heard oral argument of counsel, having reviewed all filed papers and documents and being fully advised the court rules as follows:

In private civil rights actions, where Congress has not provided a statute of limitations, the most analogous state statute of limitations will be applied to the federal action. **Johnson vs. Railway Express Agency, Inc.,** 421 U.S. 454, 462 (1975); **See also EEOC vs. Occidental Life Ins. Co.,** 535 F.2d 533 (9th Cir. 1976) cert. granted, No. 76-99, DLR No. 240, December 13, 1976. Congress does not appear to have provided an overall period of limitations for Title VII actions. Therefore, the most applicable state statute of limitations must apply.

The most analogous California statute of limitations is either the one-year statute of limitations with regard to tort liability ([Cal. Civ. Pro. Code §340(3)]) or the three-year statute of limitations with regard to actions upon a liability created by statute (Cal. Civ. Pro. Code §338(1)). It is unnecessary to determine whether the applicable statute is the one-year or the three-year statute of limitations, inasmuch as the instant suit was filed over five years from the alleged date of discrimination. Under either statute, the action is time barred. **See Clayton vs. McDonnell Douglas Corp.,** 13 FEP 451 (C.D. Cal. 1976), on appeal, No. 76-3198 (9th Cir. 1977).

Accordingly, IT IS HEREBY ORDERED that defendant's Motion to Dismiss is GRANTED and Plaintiff's complaint is dismissed.

DATED: May 20, 1977

s/ALBERT LEE STEPHENS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN LISTER,	)	
Plaintiff,	)	CV 76-3538-WMB
v.	)	
NORTH AMERICAN ROCKWELL, AUTONETICS,	)	JUDGMENT
Defendant.	)	
	)	

Defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, having been heard by the Court and the Court, having considered all of the documents filed with respect to said motion, and considered the arguments of counsel, and the Court being of the opinion that no triable issue of material fact exists in this case, and that defendant is entitled to judgment as a matter of law, therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that defendant has judgment against plaintiff as follows:

Judgment shall be entered herein in favor of defendant and against plaintiff.

DATED: June 22, 1984

s/WM. MATTHEW BYRNE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN LISTER,	) CV 76-3538-WMB
Plaintiff,	) FINDINGS OF FACT
v.	) AND
NORTH AMERICAN ROCKWELL, AUTONETICS,	) CONCLUSIONS OF LAWS
Defendant.	)
	)

On February 14, 1984 Judge Albert Lee Stephens, Jr. denied defendant's Motion for Summary Judgment. Thereafter, the case was transferred to this Court. Defendant has moved for reconsideration of its Motion for Summary Judgment. The matter was heard on June 4, 1984. The Court, having considered the pleadings and memoranda filed by the parties both on the original motion and on the motion for reconsideration, and having heard the arguments of parties, now makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Between 1969 and 1970, employment patterns at the Autonetics Division of defendant North American Rockwell (subsequently) called Rockwell International Corporation and referred to hereinafter as Rockwell) reflected a low utilization of minorities in its work force based upon the availability of each minority group in the surrounding work force.

2. The United States Office of Federal Contracts Compliance Programs (OFCCP), after conducting a review of Rockwell's status in 1969 to 1970 under the requirements of Executive Order 11246, determined that corrective action would be necessary to remedy the problem of underutilization of minority workers.

3. In response to OFCCP requirements, Rockwell set utilization goals but determined that the achievement of such goals was not possible due to extensive work force reductions during that period of time.

4. In July, 1969, defendant instituted the "Skills Development Program" ("SDP") at its Autonetics Division as a part of its affirmative action plan. Its purpose was to assist selected high potential employees with career progression plans and included an exemption from seniority displacement for participants. The program was applicable to all employees, with the exception of those covered by applicable collective bargaining agreements.

5. At approximately the same time, defendant also instituted a system for the retention of those employees on weekly payrolls during a period of reduction in the work force. With seniority being the controlling factor, this seniority system operated concurrently with the SDP.

6. The SDP was a private, voluntarily adopted, race-conscious affirmative action plan.

7. The SDP did not require the discharge of white male employees nor the replacement of white male employees with minority employees.

8. The SDP was not an absolute bar to the advancement of white male employees. The SDP applied to all employees and its participants included white male employees.

9. The SDP was a temporary measure intended to eliminate a minority imbalance and to retain minority and female employees during a period of work force reductions.

10. Plaintiff is a white male who was hired by Rockwell on April 16, 1962 as a Blueprint Trimmer and Folder at its Autonetics Division.

11. Plaintiff was not an employee covered by a collective bargaining agreement and plaintiff had no seniority rights created by a collective bargaining agreement or statute.

12. On January 19, 1971, plaintiff became a surplus employee for the Blueprinter classification and was downgraded to a Bindery Worker, a classification he had held previously. Two employees, Hispanic males, remained in the Blueprinter classification. They had less seniority than plaintiff but were participants in the SDP.

13. Plaintiff was excessed in the Bindery Worker classification on January 29, 1971, and was laid off on February 1, 1971. One employee, an Anglo female, less senior than plaintiff, remained in the Bindery Worker classification as she was a member of the SDP.

14. On June 29, 1971, plaintiff filed with the Equal Employment Opportunity Commission (EEOC) a charge of employment discrimination against defendant alleging that plaintiff had been terminated from his employment with Rockwell on the basis of his race, Caucasian, and national origin, Anglo, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, **et seq.** (1982 (Title VII).

15. On August 17, 1976, plaintiff received from the EEOC a Determination Letter notifying him that it had not found reasonable cause to believe that his charge was true and that he had a right to file suit within 90 days after receipt of the letter.

16. On November 12, 1976, plaintiff instituted this action alleging "reverse discrimination" on the basis of race and national origin in violation of Title VII. Plaintiff asserts that because he was not a minority, he was deprived of the opportunity to enter defendant's SDP and consequently be protected from layoff.

17. The opportunity to apply for SDP was available to plaintiff and all other weekly employees.

18. Any Conclusion of Law, to the extent it is deemed to be a Finding of Fact, is hereby included in these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Finding of Fact, to the extent it is deemed to be a Conclusion of Law, is hereby included in these Conclusions of Law.

2. This Court has jurisdiction pursuant to 42 U.S.C. § 2000e-5(f), plaintiff having brought this action under Title VII, as amended, 42 U.S.C. § 2000e, **et seq.**

3. Title VII does not prohibit adoption of a private, voluntary race-conscious affirmative action plan if such a plan does not unnecessarily trammel the rights of non-minority workers. **United Steelworkers v. Weber,** 443 U.S. 193, 207-08 (1979).

4. Under **Weber,** defendant's SDP was legal and appropriate as a voluntary affirmative action plan according minority preferences in order to achieve reasonable minority representation in the work force.

5. Defendant's SDP meets the criteria set forth in **Weber** in that (1) the SDP was a necessary measure designed to assist defendant in addressing the statistical disparity between the local labor force and the minority composition of defendant's work force; (2) the SDP was open to all employees and thus did not require the discharge of or create an absolute bar to the advancement of white employees; and (3) the SDP was a temporary measure intended to eliminate a minority imbalance and to retain minority and female employees during a period of work force reductions. **See Weber,** 443 U.S. at 208; **Tungren v. Wackenhut Services, Inc.,** 658 F.2d 705, 706 (9th Cir. 1981), **cert. denied,** 456 U.S. 916 (1982).

6. Plaintiff has presented no evidence that Rockwell was motivated by other than a remedial reason in implementing the SDP or that the SDP unreasonably exceeds its remedial purpose. **See Setser v. Novack Investment Co.,** 657 F.2d 962, 969 (8th Cir.) (en banc), **cert. denied,** 454 U.S. 1064 (1981).

7. This case involves an employer's voluntary modification of a seniority system. It does not involve court interference

with the operation of a bona fide seniority system protected under 42 U.S.C. § 2000e-2(h). **Cf. Firefighters Local Union No. 1784 v. Stotts,** 52 U.S.L.W. 4767 (June 12, 1984).

8. The institution of the SDP did not deprive plaintiff of any vested seniority rights or any seniority rights protected by statute or collective bargaining agreement. **See Tungren,** 658 F.2d at 707; **cf. Stotts,** 52 U.S.L.W. at 4768.

9. An employer may voluntarily enhance the seniority status of certain employees for purposes of furthering public policy interests, including the public policy interest in ameliorating the effects of past discrimination, even though this will to some extent be detrimental to the expectations acquired by other employees under a previous seniority arrangement. **See Franks v. Bowman Transportation Co.,** 424 U.S. 747, 778-79 (1976); **Tungren,** 658 F.2d at 707 & n.2.

10. Plaintiff's layoff was the result of a lawful change in Rockwell's seniority system made pursuant to Rockwell's adoption of a voluntary affirmative action program.

11. Since the SDP falls within the **Weber** guidelines and is lawful and appropriate, it follows that, for the reasons stated above, plaintiff was not discriminated against in violation of Title VII.

12. There is no triable issue as to any material fact in this action and a judgment should be entered as a matter of law.

DATED: June 22, 1984

s/WM MATTHEW BYRNE, JR.
United States District Judge

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
3255 WILSHIRE BLVD., 9TH FLOOR
LOS ANGELES CALIFORNIA 90010
AUG. 17, 1976

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN REPLY REFER TO:
Case No. YLA 204
Charge No. TLA1-2039

Brian Lister
1414 N. Lowell
Santa Ana, California 92706 — Charging Party

Rockwell International Corporation
1700 E. Imperial Highway
El Segundo, California 90245 — Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b(d) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral, and all other jurisdictional requirements have been met. No final findings have been issued by the State Agency.

Charging Party alleges that Respondent laid him off from his non-union job classification because of his race (Caucasian) and national origin (Anglo), in violation of Title VII. Charging Party states that in 1971, when he was laid off, minorities with less seniority were retained and hired due to their participation in Respondent's "Skills Development Program."

Respondent denies the allegation.

It is undisputed that when Charging Party was laid off, a less senior minority employee in his job classification was retained because he was a member of Respondent's "Skills Development Program."

The evidence first shows that prior to and during the time period at issue an ethnic and racial imbalance existed in Respondent's workforce.

Examination of Respondent's employment patterns in early 1970 reveals a significantly low utilization of Blacks and Spanish Surnamed Americans and virtual exclusion of these groups from the non-union positions (including officials/Managers; Professionals; Technicians and Office/Clericals). These non-union jobs are, on balance, the higher paying classifications and in early 1970 comprised the majority of all jobs in the Autonetics Division.

A sampling of the departments and non-union job classifications showed severe under-representation and in numerous instances total exclusion of Blacks and Spanish Surnamed Americans from various departments and job classifications.

Respondent's 1969 promotional activity, however, did not reflect a serious attempt to eradicate the apparent segregation of Black and Spanish Surnamed American employees into the lower paying, union job categories, with statistics reflecting that in 1969 Blacks and Spanish Surnamed Americans were promoted at an adversely disproportionate rate. The record shows that although 2,573 employees were promoted to non-union positions during 1969, only 58 Blacks and 101 Spanish Surnamed employees were upgraded to these jobs. These promotional activities indicate an adversely disproportionate impact upon both Black and Spanish Surnamed employees. Although Blacks comprised 3.5% of the workforce in 1969, they received only 2.2% of the upgrades to non-union jobs. Although Spanish

Surnamed Americans comprised 5% of the 1969 workforce, they were represented in only 3.8% of the promotions outside the bargaining unit.

This promotional activity clearly did not reflect a serious attempt to eradicate the apparent segregation of Black and Spanish Surnamed employees into the lower paying union job categories.

Respondent's statistics further show that the few Blacks and Spanish Surnamed Americans who did work in the non-union categories had less chance of retention than other employees. Employees turnover records for 1969 show that Spanish Surnamed American employees had a 73% chance of being retained; Blacks had a 71% chance of being retained; and other employees had an 87% chance of retention.

The result of these adverse personnel actions in 1969 was that the already sparce representation of Blacks and Spanish Surnamed Americans at the non-union level decreased even further. Between the beginning of 1969 and the first part of 1970 the utilization of Blacks decreased from 2% to 1.6%; the utilization of Spanish Surnamed Americans decreased from almost 4% to 3.3%; and the utilization of other employees increased from 93% to 95% in the non-bargaining unit jobs.

Respondent presented no explanation for its extreme underutilization of Blacks and Spanish Surnamed Americans in the high level, non-union jobs, and evidence shows that the exclusion of Blacks and Spanish Surnamed Americans from the non-union workforce tended to be even more severe in years prior to 1970. Respondent made no claim that the minorities previously bypassed had been excluded from employment at certain job levels because of inherent deficiencies. Indeed, by its own admission, Respondent viewed its low minority representation as an unlawful situation which required rectification.

The Commission has held that in the absence of any legitimate explanation for a very small proportion of Blacks and Spanish Surnamed Americans in other than low level positions in Respondent's workforce, it is reasonable to infer that Respondent maintained and continued to maintain job classifications or categories segregated on the basis of race and national origin. Such segregation, of course, reflects discriminatory patterns with respect to these job classifications and categories. See Commission Decision No. 74-05, CCH EEOC Decisions (July 13, 1973), para. 6387.

The investigation further showed that Respondent's apparent segregation of Blacks and Spanish Surnamed Americans into the lower paying jobs had been perpetuated by its discretionary personnel procedures, which, because of their subjective nature, were not amenable to review.

Prior to and at the time of the alleged violations, retention or layoff of non-union employees was based upon a "totem pole" ranking system in which employees were numerically rated with regard to their merit and "value," Respondent's stated objective being to "retain the most valuable employees consistent with business conditions and work to be accomplished." The rankings were and are conducted by individual departmental supervisors, virtually all of whom were and are Anglo males. Excess actions were then based upon the employees' comparative rankings, layoffs starting with those having positions on the bottom of the "totem pole." While Respondent's written policy states that length of service (i.e. seniority) served as a factor to be considered only when all other employee qualifications were similar. Respondent has stated on various occasions that "a flip of the coin" can determine comparative rankings when employees are relatively equal.

Similarly, promotions involving non-union jobs were determined by the individual supervisors, who used criteria such as "potential" and "ability to perform" in making their selections.

Respondent's retention listings show that under this system, personnel decisions rarely conformed to employees' relative seniority. Respondent's use of subjective criteria frequently allowed some of the least senior persons to be retained while some of the most senior employees were excessed. Even when sensiority was considered, Respondent's records show that exceptions to its use were so pervasive that, as a criterion for personnel action, it was virtually meaningless. Respondent's policy and practice of reliance upon these discretionary criteria show that Charging Party could not reasonably have expected that personnel practices regarding his employment would have been based strictly, if at all, on his seniority. In addition, as shown above, Respondent's subjective systems worked to the benefit of Anglos while having an adversely disproportionate impact on minorities.

As noted above, under the company's system, the supervisor's subjective evaluation of the employee's advancement or layoff, and an individual supervisor could, if he were so inclined, exercise discrimination in his selection of candidates. A procedure such as the one used herein, is a ready mechanism for discrimination which may be concealed from management. In the absence of objective criteria for determining which employees are best qualified, and in view of the statistical evidence demonstrating the disparity in utilization, promotion and retention among Anglos, Blacks and Spanish Surnamed Americans, the Commission concludes that during the time period at issue, Respondent's discretionary personnel procedures excluded and presumably would have continued to exclude Blacks and Spanish Surnamed Americans from its non-union workforce because of their race and/or national origin in violation of Title VII.

The negative evaluation of Respondent's comspliance with federal law was shared by another federal agency. In 1969-70, the U.S. Office of Federal Contract Compliance conducted a

review of Respondent's status under the requirements of Executive Order 11246, and determined that corrective action would be necessary with regard to certain problem areas it had found. Therefore, in addition to requiring Respondent to develop and implement an affirmative action plan with goals set for the utilization of minorities, the OFCC also specified areas of deficiency which it required Respondent to rectify: all white departments; promotion to high-level jobs including management; and implementation of counselling, career development, and career opportunities for potentially promotable minorities.

Similarly, the Commission has held that affirmative action programs can be required where they are needed to correct the effects of Respondent's past discriminatory employment practices, and maintains that such a program may even include hiring a specific percentage of minorities in order to remedy past discriminatory hiring practices, especially when their availability is evidenced by the percentage of minorities in the surrounding population. See Commission Decision No. 74-57, CCH EEOC Decisions (1973) para. 6420.

Respondent states that the company itself recognized deficiencies in its utilization of minorities, and feared that unless corrective action were taken minority representation would further decrease. Consequently, in conjunction with OFCC requirements, Respondent set utilization goals for minorities in its workforce based upon the availability of each ethnic group in the surrounding community workforce. Effort to achieve these goals through hiring was not possible due to a heavy layoff situation; Respondent therefore developed the "Skills Development Program" (SDP) as a corrective vehicle for training, promotion and retaining some of its high-potential minority employees.

The Skills Development Program was instituted in approximately April 1970 as part of Respondent's Affirmative Action Plan. Its purpose was to assist in achieving Respondent's Affirmative Action goal of utilizing minorities in jobs from which they had been previously excluded or under-represented.

Most of the Program's participatants (80.4%) were from non-union jobs, since personnel actions for those positions have traditionally allowed flexibility and have not been dependent upon union contract provisions, such as seniority.* In addition, the non-union job levels (Official/Manager; Professional; Technician; Office/Clerical) encompassed the positions from which minorities had been most severely excluded.

It is undisputed that these non-union participants of the SDP were formerly designated as recipients of "special attention." They were generally exempted from layoff, and, as part of their upward mobility plans, when they were deemed "fully qualified" they could be placed in job classifications from which other employees had been laid off.

*The applicable provisions of the union contract, such as seniority requirements, continued to determine personnel actions for the SDP participants who worked in bargaining-unit positions.

Recognizing Respondent's ob'igation to take corrective action to eradicate the vestiges of past discrimination and prevent additional discrimination, the Commission notes that but for the protection which the SDP afforded its minority participants, the adverse impact which Respondent's subjective procedures had upon minorities would presumably have continued unchecked, and would have violated the Act. In this context, Respondent's use of the SDP served not just as an affirmative action vehicle to increase the utilization of minorities, but also as a tool to protect at least some of its non-union minorities

from the discriminatory adverse action causing exclusion from high level jobs.

While the SDP was somewhat successful in this endeavor, it did not fully remedy the racial imbalance at issue. For example, 3 1/2 years after the Program was implemented, utilization of Blacks and Spanish Surnamed Americans in the three highest-paying non-union job categories had increased from 1% and 2% respectively to only 2.8% and 4.6% respectively. At no point did Respondent's utilization of Blacks and Spanish Surnamed Americans remotely approach the 14.8% availability Respondent itself set with regard to these groups much less the 29.1% availability of Blacks and Spanish Surnamed Americans in Los Angeles County. At no point did Respondent's utilization of minorities approach parity, much less demonstrate any preferential treatment of these groups.

Perhaps the failure of the SDP to more fully remedy the exclusion of minorities from Respondent's higher paying jobs is partially explained by the fact that participation in the Program was not limited to minorities.

Respondent states that it included Anglos in the Program in an attempt to avoid accusations of discriminatory preferential treatment. As a result, the Program contained more participants of Anglo origin than any other ethnic group. The data show the following representation of ethnic groups in the Program:

Anglo	455 (36%)
Spanish Surnamed	370 (29%)
Asian/Native American	252 (19.5%)
Black	188 (15%)

As shown above, Respondent's preferential treatment of Anglos in the higher-paying jobs was a Title VII violation

which necessitated Affirmative Action to correct exclusion of minorities. It is somewhat ironic that the "remedial" Program established by Respondent operated to the benefit of Anglos more than any other ethnic group.

Respondent's discretionary system has traditionally advocated personnel actions based upon employee "value" rather than seniority; Respondent's use of this system resulted in numerous Anglos being subject to beneficial treatment while more senior employees were adversely effected; and, based upon the SDP membership statistics, Anglos comprised the largest ethnic group subject to "unique" or "preferential" treatment under this "remedial" Program. In summary, the information demonstrates that Respondent's personnel system, including any "Affirmative Action" measures it encompassed, worked to the benefit of Caucasian Anglos and continued to do so.

We further note that it was not until the personnel benefits traditionally enjoyed by Respondent's Anglo employees were extended to at least some minorities that Charging Party protested the absence of a stringent seniority provision governing Respondent's personnel actions.

Based upon this information, the Commission does not credit Charging Party's assertion that he was subjected to adverse action because of his race and national origin in violation of Title VII.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to Charging Party with information regarding the procedure.)

On behalf of the Commission:

s/LORENZO H. TRAYLOR, Director
Los Angeles District Office

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1543 West Olympic Boulevard, Suite 340
LOS ANGELES, CALIFORNIA 90015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED IN REPLY REFER TO:
TLA1 2039: Lister v.
Rockwell International

Brian Lister
1414 N. Lowell
Santa Ana, CA 92706

Re: TLA1 2039
NO CAUSE DISMISSAL
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

In Case No. TLA1 2039 before the Equal Employment Opportunity Commission, United States Government.

YOU ARE HEREBY NOTIFIED THAT:

> The Commission has not found reasonable cause to believe your charge of employment discrimination is true. The issuance of this notice terminates the Commission's processing of your charge.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

BEST AVAILABLE COPY

You have a right to inspect and copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material or have any questions about your legal rights contact EEOC Legal Services Unit (213/688-3414). The Legal Services Unit will be unable to assist you in filing your case in court or in securing a lawyer for you.

An information copy of this Notice has been sent to the respondent(s) named in your case. If you file suit, the respondents named in your case which are also defendants in your suit will be given the same opportunity to inspect and copy information contained in the Commission's case file that you have been given.

Sincerely,
s/LORENZO H. TRAYLOR, Director
Los Angeles District Office

cc:
Chief Executive Officer
Rockwell International
Corporation
P. Wilson/B. Schlei (2)

GLEN A. STEBENS

BEHRENS, RECHT, FINLEY & HANLEY
A Law Corporation
615 Civic Center Drive West, Suite 210
Santa Ana, CA 92701
(714) 547-9608

Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN LISTER,	) CV 76-3538-WBM
Plaintiff,	) MEMORANDUM OF
v.	) POINTS AND
NORTH AMERICAN ROCKWELL,	) AUTHORITIES IN
AUTONETICS,	) OPPOSITION TO
Defendants.	) DEFENDANTS'
	)MOTION FOR
	) RECONSIDERATION
	) Date: June 4, 1984
	) Time: 10:00 AM
	) Place: Courtroom No. 9

I

DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT BE RECONSIDERED

Defendant presently brings this Motion to Reconsider based upon Local Rule 7.13. An examination of this Rule shows that in order to prevail in such Motion there must be "new or different facts or circumstances claimed to exist which do not then exist or where not shown upon such prior motion." The Declaration of Mr. Kartman in Support of Defendants' Motion

relies solely on one ground. That is, that in Judge Stephens' denial of Defendants' Motion for Summary Judgment, reliance was place on the case of **Reed v. Lockheed Aircraft Corp.,** 613 F. 2d 757 (9th Cir., 1980),

Even a cursory examination shows that the papers in support of this Motion to Reconsider are nearly identical with those filed in their original Motion for Summary Judgment heard on March 1, 1982 before Judge Stephens. The only new authorities cited by Defendants are the cases of **Brown v. Neeb,** 644 F. 2d 551 (6th Cir., 1981) and **Stotts v. Memphis Fire Department,** 679 F. 2d 541 (6th Cir., 1982). These cases both deal with a challenge to a consent decree in reverse discrimination cases and do not represent any change in the law from when this motion was first heard. In fact, there has been no change in law or circumstances pointed out by Defendants which would make this a proper case for reconsideration of the Summary Judgment Motion. The only reason that this Motion is brought at this time, is that a Judge has been appointed to the case before whom the Defendants hope to get a more favorable judgment. Judge Stephens heard this same motion on March 1, 1982 and after adequate consideration of the papers and arguments of both parties correctly denied this motion. This Court should not now reconsider this identical Motion.

II

SUMMARY JUDGMENT CAN BE GRANTED ONLY IF THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers, interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Federal Rules of Civil Procedure
56 (c)

This principle is reiterated in **Reed v. Lockheed Aircraft Corp.,** supra, as well as **Jackson Tool and Die, Inc. v. Smith,** 339 F. 2d 88 (5th Cir., 1964).

"Summary judgment can be granted only if there is no genuine dispute as to any material fact. This requirement is to be strictly construed so as to insure the factual issues will be determined without the benefit of the truth seeking procedures of a trial." **Id.** at 91.

III

GENUINE ISSUES OF FACT EXIST IN THIS CASE

As stated by Judge Stephens in his Notice of Decision on Defendants' original Summary Judgment Motion, "In the instant case material issues of fact exist with respect to whether Rockwell's SDP Program conforms to the requirements of **United Steel Workers of America v. Weber,** supra." Defendants argue that **United Steel Workers of America v. Weber,** 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d, 480 (1979) is dispositive of the present action. It is true that in **Weber** the Court held that the affirmative action plan developed by the Defendant was permissible, since it mirrored the purposes of the statute and was designed to break down old patterns of racial segregation and hierarchy. But, this plan was upheld because it "does not unnessarily trammel the interests of the white employees." **Id.** at 208. In addition it was found that the plan in **Weber** did not exceed its remedial purpose. Although the SDP plan adopted by North American Rockwell may have a proper remedial purpose it exceeds that purpose in its application.

In **Setser v. Novack Investment Corporation,** 657 F. 2d 962 (8th Cir., 1981) the Court held that a plan which unreasonably exceeds its remedial pourpose is sufficient to raise a genuine issue of material fact and avoid a summary judgment. **Id.** at 969. The Court reversed a judgment in favor of an employer in an action which was instituted by a white employee for alleged racial discrimination and retaliation. An affirmative action program which unnecessarily infringes upon the rights of a class of person beyond its remedial purposes and takes it outside the scope of the **Weber** decision. In **Weber,** the plan that was upheld did not require the discharge of a non-minority employee, but dealt with seniority rights and rights to advance within the workplace. When the operation of the plan displaces a non-minority member from his employment, it exceeds its remedial purpose.

The immediate situation is more analogous to that presented in **Setser** and **Moseley v. Goodyear Tire and Rubber Co.,** 612 F. 2d 187 (5th Cir., 1980). There the Court stated that:

> ". . . Remedial seniority may not be used to displace or 'bump' a permanent employee working a regular assignment. If there is no other option, rather than bumping a permanent employee, victims of employee discrimination are to be given a preference for future vacanciess." **Id.** at 191.

In the case at bar, Brian Lister, a Caucasian employee, was not included in Rockwell's SDP Program, was later demoted from his position to that of a lower position and eventually laid off. Had Mr. Lister been a minority, he would have been more likely to have been included in the SDP Program and not been subject to the lay-off. Unlike the situation in **Weber,** Brian Lister was then discharged and was never re-offered that or other employment by the Defendants. In fact, this "remedial seniority" resulted in the discharge of an Anglo employee. What distinguishes this situation from that in **Weber** and **De-**

nnison v. City of Los Angeles Department of Water and Power, 658 F. 2d 694, (9th Cir., 1981) is precisely that the effect of these plans did not require the discharge of non-minority employees. The same cannot be said of Rockwell's SDP Program.

Defendants have argued in their papers as they did in their earlier motion that Plaintiff, in relying upon the cases of **Setser** and **Moseley** are relying upon Circuit Court cases instead of that of the U.S. Supreme Court case in **Weber.** These cases obviously do not overrule **Weber,** but are the lower court interpreting its provisions. Since not all aspects of a situation can be covered under one decision, these lower court decisions are necessary to broaden the scope of the Supreme Court rulings to the different situations brought before them.

The Defendents also cite **United States v. City of Miami,** 14 F. 2d 1322 (5th Cir., 1980) which involves state action under the 14th Amendment. The City of Miami in a consent decree established a seniority system. In the words of the court, "the consent decree does not award any retroactive seniority at all and each employee is given seniority for the time he was employed by the City." **Id.** at 1340. Again, this is precisely how the situation differs from that at bar. In Lister's case, a remedial seniority was created through the SDP Program so that even though Brian Lister had seniority and was not included within this Program, he was subject to layoff even though those with less seniority withisn the SDP Program and elsewhere who happen to be minority persons were not laid off.

The Defendants also rely on **Tanagren v. Wachenhut Services,** 658 F. 2d 705 (9th Cir., 1981). This case concerns an affirmative action program undertaken as part of a collective bargaining agreement. The Court held that the seniority rights are not vested property rights and can be altered to the detriment of the employee so that a good faith agreement between the union and employee. This may be sharply contrasted with an

employer's unilateral action that deprives a man of his employment one year before his pension rights vest. In addition, the **Wachenhut** court stressed the affirmative action program was "carefully contoured to accomplish its limited objective insuring that any reduction in force do not disproportionately impact on minorities." **Id.** at 707. Rockwell's affirmative action program by contrast is not so carefully contoured. Rather than merely protecting minorities from lay-offs, the largest group in the program, namely Anglos, are also protected. Without further factual analysis, it is impossible to determine whether the broad protection that included non-minorities had an impact on Plaintiff's retention.

IV
CONCLUSION

The present action was instituted against Rockwell because Plaintiff suffered the loss of his job. This job loss was the result of a general employee reduction based on a seniority retention plan from which a select group of employees including Brian Lister, was excluded. The plan adopted by Rockwell exceeds its remedial purpose and "unnecessarily trammels the rights of a class of persons." It infringes these rights of Brian Lister, as a Caucasian, since its effect was to require his discharge. In **Weber's** situations, he was not a part of the affirmative action program and therefore denied advancement in his job. He was not discharged or demoted as was the case with Brian Lister.

The question is not as presented by the Defendants but should properly be phrased in terms of if Brian Lister had not been white would he have been then subject to the lay off that he was. Were the Plaintiff a minority, the chances that he would have been included in the SDP Program would have increased and because of its remedial seniority one of the other minority members with less seniority than himself would have

been discharged as opposed to him. In other words, the question should be not how many whites were in the SDP Program, but how many minorities were put in the same position as Brian Lister. There are none.

Since there is no basis for reconsideration of this motion, for the reasons set forth above, this Motion to Reconsider should be denied. Even if decided on its merits, the Summary Judgment motion should be denied. There are no facts (outside of Mr. Kartman's Declaration) before this Court as to how Rockwell's SDP Program affected or did not affect non-minority employees or whether the Plan as applied required the discharge of non-minority employees. This is a situation, as pointed out in **Reed,** where the crucial elements and the proof is in the hands of the alleged wrongdoers and where a Summary Judgment Motion is inappropriate.

Respectfully Submitted,

DATED: May 14, 1984

s/GLEN A. STEBENS
Attorney for Plaintiff

The size and style of typefaces used in the text of this document are 12-point Times Roman and 12-point Times Bold both on 14-point leading. Paper composition is 60-lb. Cascade offset, vellum finish. The cover composition is 80-lb. Exact vellum bristol.

Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-386

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

BRIAN LISTER
Petitioner,
VS.
NORTH AMERICAN ROCKWELL, AUTONETICS,
Respondent.

On Petition For A Writ Of Certiorari To the United States Court of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID J. SHAPIRO
Counsel for Respondent
MARC G. KARTMAN
Of Counsel
2230 East Imperial Highway
El Segundo, California 90245
(213) 647-5039

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

QUESTION PRESENTED FOR REVIEW

Was the Ninth Circuit Court of Appeals correct in affirming the District Court's determination that Respondent Rockwell did not discriminate against Petitioner Lister in violation of Title VII by implementing its Skills Development Program, voluntarily designed and adopted to correct minority imbalances in the work force?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	i
STATEMENT OF THE CASE.....	1
BASIS FOR JURISDICTION	3
REASONS WHY THE PETITION SHOULD BE DENIED.....	5
1. The Petition is Untimely and Therefore This Court Lacks Jurisdiction	5
2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition	5
3. There are No Special and Important Reasons for the Court to Grant this Petition For Review on Writ of Certiorari.....	7
CONCLUSION.....	9
APPENDIX A (Clerk's Letter)	A-1
APPENDIX B (Order)	B-1

TABLE OF AUTHORITIES CITED

Cases

	Page
Adicks v. Kress & Co., 398 U.S. 144 (1970)	6
California v. Taylor, 353 U.S. 553 (1957)	6
Chance v. Board of Examiners, 534 F.2d 993 (2nd Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), *rehearing denied*, 434 U.S. 881 (1977)	7, 8
Citizens Bank v. Opperman, 246 U.S. 448 (1919)	3
Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971)	4
Department of Banking v. Pink, 317 U.S. 264 (1942).	3
Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir. 1985)	8
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984)	8
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)	6
Johnson v. Transp. Agency, Santa Clara Cty., Cal., ____ U.S. ____, 107 S. Ct. 1442 (1987)	6, 7, 9
Local 93, Firefighters v. City of Cleveland, ____ U.S. ____, 106 S. Ct. 3063 (1986)	8
Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943)	3
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	6, 7
Teague v. Commissioner of Customs, 394 U.S. 977 (1969)	4
Tyrrel v. District of Columbia, 243 U.S. 1 (1917)	6
United States v. Ortiz, 422 U.S. 891 (1975)	6

TABLE OF AUTHORITIES CITED

CASES

Page

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 2, 7, 9

Rules

United States Supreme Court Rule 17 7

United States Supreme Court Rule 29 4

United States Supreme Court Rule 33 ..... 4, 5

Statutes

United States Code, Title 28, § 1254(1) 3

United States Code, Title 28, § 2101(c) 3, 4

United States Code, Title 42, § 2000e (Civil Rights Act of 1964, Title VII) 2, 5, 6, 7, 8

No. 87-386

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

BRIAN LISTER
Petitioner,

VS.

NORTH AMERICAN ROCKWELL, AUTONETICS,
Respondent.

On Petition For A Writ Of Certiorari To the United States Court of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, North American Rockwell, Autonetics, respectfully submits this brief in opposition to the Petition for Writ of Certiorari:

STATEMENT OF THE CASE

On or about November 12, 1976, Petitioner Brian Lister (referred to herein as "Petitioner" or "Lister") instituted the present action against his former employer, North American Rockwell, Autonetics (subsequently called Rockwell International Corporation and referred to hereinafter as "Respondent" or "Rockwell"). In his Complaint, Lister alleges that Rockwell discriminated

against him because of his race, Caucasian, and his national origin, Anglo, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

On February 5, 1982, Rockwell filed a Motion for Summary Judgment on the ground that Lister's "reverse discrimination" action was indistinguishable from *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), where this Court held that Title VII does not forbid a private employer from implementing a voluntary affirmative action plan that accords racial preferences in order to rectify an imbalance in minority representation in its work force.

On February 21, 1984, Judge Stephens denied Rockwell's motion on the ground that "material issues of fact exist with respect to whether Rockwell's SDP (Skills Development Program) program conforms to the requirements of *United Steelworkers of America v. Weber, supra.*" On May 7, 1984, Rockwell moved the District Court to reconsider.

On June 22, 1984, Judge Byrnes, to whom this case had been transferred on March 19, 1984, granted Rockwell's Motion to Reconsider and entered judgment for Rockwell and against Lister. Judgment was entered on June 25, 1984.

On or about July 24, 1984, Lister filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting Rockwell's Motion for Summary Judgment. On January 8, 1986, the Ninth Circuit Court of Appeals affirmed the District Court's determination. On or about April 12, 1986, Lister filed a Request for Rehearing with the Ninth Circuit Court of Appeals. On May 19, 1986, the Ninth Circuit Court of Appeals denied the Petition for Rehearing.

On or about August 9, 1986, Lister attempted to file a Petition for a Writ of Certiorari with this Court. Apparently, this Petition was rejected for failure to comply with the Rules of the Court. On or about June 18, 1987, Lister attempted to file a second Petition, which again was rejected by this Court for failure to comply with its Rules. Lister was given 21 days to resubmit it in the proper form for filing. See Appendix A to Opposition. Thereafter, on or about September 4, 1987, Lister filed the instant Petition with this Court, and on September 18, 1987, notified Respondent by registered mail that the Petition had been docketed.

BASIS FOR JURISDICTION

Although Lister failed to so state in his Petition, presumably the jurisdictional basis for the Petition is 28 U.S.C. § 1254(1).

In 28 U.S.C. § 2101(c), however, Congress provided that a Writ of Certiorari to the Supreme Court from a judgment in a civil action shall be "applied for within ninety days after the entry of such judgment" and that this time may be extended by a Justice, for good cause shown, "for a period not exceeding sixty days." Because these time limitations are prescribed by Congress, the untimely filing of a Petition For a Writ of Certiorari is considered to be a jurisdictional defect, and this Court uniformly has denied such petitions for want of jurisdiction. *Department of Banking v. Pink,* 317 U.S. 264, 268 (1942). See also *Matton Steamboat Co. v. Murphy,* 319 U.S. 412 (1943); *Citizens Bank v. Opperman,* 246 U.S. 448, 450 (1919). This jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained. See,

e.g., *Deal v. Cincinnati Board of Education,* 402 U.S. 962 (1971) (airline lost all the papers); *Teague v. Commissioner of Customs,* 394 U.S. 977 (1969) (unforeseeable snow storm created a postal delay).

Here, Petitioner attempted to file his original Petition within the 90 day period provided by 28 U.S.C. § 2101(c), but the Petition was rejected by the Court for failure to comply with its Rules. He then made no further filing within the remainder of the 90 day filing period. Instead, Petitioner waited over ten months, from about August 9, 1986 to about June 18, 1987, before attempting to file a second Petition, which was also rejected by the Court. Although he was notified by the Court Clerk that he must resubmit the Petition in proper form within 21 days (see Appendix A to Opposition), he waited more than two months, from about June 18, 1987 to about September 4, 1987, before filing the Petition now before the Court.

Rockwell has received no notice from the Court or Lister that he was granted any extension of time to file his Petition. He certainly did not seek one in compliance with Supreme Court Rule 29. Assuming, *arguendo,* that he was granted such an extension, it could not in any event have exceeded sixty days pursuant to 28 U.S.C. § 2101(c).

Furthermore, United States Supreme Court Rule 33.7 states in pertinent part that:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its

> discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel."

Assuming *arguendo* that the Court does not deem Lister's original Petition untimely, the Court should dismiss the instant Petition because Lister did not substitute new and proper copies promptly pursuant to Rule 33. To the contrary, he waited over ten months before attempting to substitute a second Petition. Moreover, when that Petition was also rejected, he ignored the Clerk's instruction to substitute new and proper copies within 21 days (Appendix A to Opposition). Therefore, this Petition is untimely and this Court has no jurisdiction.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition is Untimely and Therefore This Court Lacks Jurisdiction.

This issue is addressed *supra* under the heading "Basis for Jurisdiction."

2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition.

The Petition states that the question presented is, "were Petitioner Lister's rights, under the Equal Protection Clause of the Fourteenth Amendment, violated by North American Rockwell when they laid off Lister. . . ." But neither the District Court nor the Ninth Circuit Court of Appeals decided that question in this proceeding. Petitioner's original Complaint alleged only a violation of Title VII of the Civil Rights Act of 1964, not a violation of the Fourteenth Amendment's Equal Protection Clause. The District Court's judgment therefore was

limited to a Title VII action. See Appendix to Petition at pages 16-20. Similarly, the question presented to the Ninth Circuit Court of Appeals, from which Lister's Petition for a Writ of Certiorari is taken, was whether Rockwell's voluntary affirmative action plan violated Title VII, not the Fourteenth Amendment's Equal Protection Clause. That Court ruled only on the Title VII question. See Appendix to Petition at pages 9-11.

This Court generally limits its consideration of the case "to the questions specifically brought forward by petition." *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 177-178 (1938). Those questions must, in addition, properly arise in the record, *Tyrrel v. District of Columbia,* 243 U.S. 1 (1917), and must have been argued and briefed below, *California v. Taylor,* 353 U.S. 553, 557, n.2 (1957). See also *United States v. Ortiz,* 422 U.S. 891, 898 (1975). The Court has also declared that it "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adicks v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970). Moreover, in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.,* ____ U.S. ____, 107 S. Ct. 1442, 1446, n.2 (1987), the Court refused to decide whether a voluntary affirmative action plan violated the Equal Protection Clause as well as Title VII because "no constitutional issue was either raised or addressed in the litigation below." Because the Petition raises only the Fourteenth Amendment Equal Protection Clause question and does so for the first time in this proceeding, it should be denied.[1]

---

[1]Even if the Court considers the Fourteenth Amendment Equal Protection Clause issue, the Petition should be denied because Rockwell is a private, not a public, employer and therefore is not covered by the Fourteenth Amendment. *Rendell-Baker v. Kohn,* 457 U.S. 830, 837 (1982). See also *Johnson v. Transp. Agency Santa Clara*

3. There Are No Special and Important Reasons For The Court to Grant This Petition For Review On Writ of Certiorari.

Supreme Court Rule 17 states in pertinent part that "a review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Lister's Petition presents no such reasons and therefore should be denied.

The Ninth Circuit Court of Appeals in this proceeding affirmed the District Court's judgment that Rockwell complied with this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), when it laid off Lister pursuant to a voluntary affirmative action plan and therefore did not violate Title VII. *Weber* was recently affirmed by this Court in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, ____ U.S. ____, 107 S. Ct. 1442 (1987). Therefore, Lister's Petition neither raises an important question of federal law which has not been, but should be, settled by this Court, nor one that was decided in conflict with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

The only argument made by Lister in support of the Petition is that the decision below is contrary to three cited cases. Even ignoring for the moment the fact that *Weber* and *Johnson* are controlling, all of those cases are inapposite. One of them, *Chance v. Board of Examiners*, 534 F.2d 993 (2nd Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), *rehearing denied*, 434 U.S. 881 (1977), deals with

---

Cty., Cal., ____ U.S. ____, 107 S. Ct. 1442, 1446, n.2 (1987) ("of course, where the issue is properly raised, *public employers* must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. (Emphasis added; citations omitted).

a wholly different question — whether a *bona fide* seniority system that operates on a "last hired-first fired" basis is invalid if it disproportionately affects minorities.

The second case cited by Lister, *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984), is inapposite for virtually the same reason as *Chance,* as the Ninth Circuit Court of Appeals noted below:

> "Lister also argued that *Firefighters Local Union No. 1784 v. Stotts,* 104 S. Ct. 2576 (1984) supports his position since the Supreme Court invalidated an injunction which prohibited a municipality from instituting a last hired, first fired policy. *Firefighters* is not dispositive. The Supreme Court 'simply [held] that a court may not modify a pre-existing race-conscious consent decree in such fashion that employment practices would divest another group of employees of entitlements under a bona fide seniority system.' *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985)." (See Appendix B to Opposition)

Similarly, *Local 93, Firefighters v. City of Cleveland,* ____ U.S. ____, 106 S. Ct. 3063 (1986), dealt not with a voluntary affirmative action plan but presented the question whether Title VII precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices. That this Court answered "no" supports the action taken by the courts below in this case to the extent *Local 93* is relevant at all.

The District Court below found that Lister was laid off pursuant to a voluntary affirmative action plan that satisfied all of *Weber*'s requirements. See Appendix to Petition at pages 16-20. The Ninth Circuit Court of Appeals

affirmed. See Appendix to Petition at pages 9-11 and Appendix B to Opposition. Lister raises no special or important reason to grant his Petition. He merely states that the courts below erred in reaching their decisions, citing inapposite cases but failing to cite this Court's recent decision in *Johnson* reaffirming *Weber* and, therefore, the decisions of the courts below. Lister's Petition should therefore be denied.

CONCLUSION

For these reasons, the Petition For a Writ of Certiorari should be denied.

DAVID J. SHAPIRO
Counsel for Respondent

MARC G. KARTMAN
Of Counsel
2230 East Imperial Highway
El Segundo, California 90245

Appendix A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

July 2, 1987

Mr. Brian Lister
1414 North Lowel
Santa Ana, California 92706

Re: *Brian Lister v. North American Rockwell Autonetics*

Dear Mr. Lister:

Your petition for writ of certiorari was received June 18, 1987 but must be returned because it isn't in the proper form. First, the petition must meet the size requirements of Supreme Court Rule 33. Specifically, the size of the booklet must be 6⅛ by 9¼ inches. Second, the petition must be followed by an appendix containing the documents required by Rule 21.1(k). Third, the questions presented for review must be the very first item appearing in the petition. See Rule 21.1.

You may correct your petition accordingly and resubmit it for filing within 21 days of receipt of this letter. We have retained your $200 check in anticipation of your corrected filing.

Sincerely,

RUTH BUTLER
Assistant Clerk

cc: Mark Cartman, Esq.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN LISTER,
Plaintiff-Appellant,

v.

NORTH AMERICAN ROCKWELL AUTONETICS,
Defendant-Appellee.

CA NO, 84-6175
DC No. CV 76-3538
(Central California)

ORDER

Before: BARNES, FARRIS, and CANBY, Circuit Judges.

The panel has voted to amend the memorandum disposition filed January 28, 1986 by inserting a paragraph on page 3, line 6, just prior to the final paragraph of the disposition.

> Lister also argued that *Firefighters Local Union No. 1784 v. Stotts,* 104 S. Ct. 2576 (1948) supports his position since the Supreme Court invalidated an injunction which prohibited a municipality from instituting a last hired, first fired policy. *Firefighters* is not dispositive. The Supeme Court "simply [held] that a court may not modify a pre-existing race-conscious consent decree in such a fashion that

employment practices would divest another group of employees of entitlements under a bona fide seniority system." *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

The petition for rehearing is denied. The memorandum disposition filed January 28, 1986 is amended as set forth above.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 2, 1987, I served the within BRIEF IN OPPOSITION in re: "Brian Lister vs North American Rockwell Autonetics" in the United States Supreme Court October Term 1987 No. 87-386.

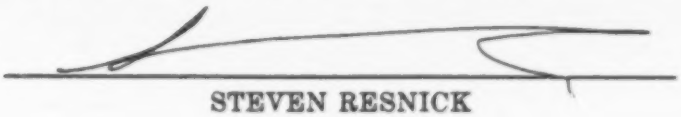
on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Brian Lister
1414 North Lowell
Santa Ana, CA 92706

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 2, 1987, at Los Angeles, California



STEVEN RESNICK